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Supreme Court of the United States

OCTOBER TERM, 1948

No. 249

T. B. HOLLIDAY ET AL., APPELLANTS,

versus

GOVERNOR OF STATE OF SOUTH CAROLINA, ATTORNEY GENERAL OF STATE OF SOUTH CAROLINA, R. H. BEARDEN, SHERIFF OF GREENVILLE COUNTY, SOUTH CAROLINA, AND ALL LAW ENFORCEMENT OFFICERS OF THE STATE OF SOUTH CAROLINA, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

STATEMENT

This matter is before the Court on motion of appellees to dismiss or affirm the appeal herein.

The appellants brought the instant suit in the United States District Court for the Western District of South Carolina to enjoin the enforcement of Section 1301 of the Code of Laws of South Carolina for 1942 as construed by

the South Carolina Supreme Court on the ground that such enforcement violates the rights of the appellants under the due process of law and equal protection of law clauses of the 14th Amendment to the United States Constitution. An interlocutory injunction was also sought and the case was therefore heard by three Judges under the provisions of Section 266 of the Judicial Code. On the hearing for the interlocutory injunction the case was submitted by counsel for final decree upon the merits. The application for interlocutory injunction as well as permanent injunction was denied and the complaint dismissed on the merits by the three Judge Court which held that the above statute of South Carolina was valid.

The appellants duly applied for and were allowed an appeal to the Supreme Court of the United States from the Rulings, Order and Decree of the specially constituted United States District Court for the Western District of South Carolina, and by virtue of Sections 238 and 266 of the Judicial Code as amended (28 U. S. C. A. Sections 345 and 380) this Court has jurisdiction of the instant appeal.

QUESTIONS INVOLVED

The appellees seek to dismiss or affirm under the provisions of Rules 7 and 12 of the Rules of the Supreme Court of the United States upon the ground that the questions on which the decision of the cause depend are so unsubstantial as not to require further argument. The instant appeal presents the following questions, which the appellants allege are substantial for a determination of the appeal herein.

(a) What is the purpose of Section 1301 of the Code of Laws of South Carolina for 1942?

(b) Does the legislative enactment as construed by the South Carolina Supreme Court under the above statute

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accomplish or tend to accomplish the purpose for which it was enacted?

(c) Does the above statute deprive the Appellants of their rights in violation of the due process of law clause of the 14th Amendment to the United States Constitution?

(d) Does the above statute deny to the Appellants the equal protection of the law in violation of the 14th Amendment to the United States Constitution?

ARGUMENT

Point A

The manifest purpose of the South Carolina Statute in question is to outlaw or suppress gambling devices per se.

It is a fundamental rule that in determining the constitutionality of a statute the courts will inquire into the purpose and object of the statute involved.

Section 1301 of the Code of Laws of South Carolina for 1942 declares it unlawful for any person, firm, or corporation to keep or operate on his, her, or its premises, any vending or slot machines, punch boards, pull boards, or other devices pertaining **to games of chance** of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return in value for each coin deposited therein, and in which there is no element of chance, and provides that this Section is also intended to prohibit all vending, slot machines, punch boards, pull boards, or other devices pertaining to **games of chance** that display different pictures, words, or symbols, at different plays, or different numbers, whether in words or figures, or which deposit tokens or coins at irregular intervals, or in varying numbers to the player or in the machine. (Emphasis added.)

The Supreme Court of South Carolina in the cases of *Alexander v. Hunnicutt*, 196 S. C. 364, *Alexander v. Martin*, 192 S. C. 176, and *Ingram v. Bearden*, 47 S. E. (2d) 833, has interpreted the aforesaid statute to include within the prohibition thereof coin operated non payout pin tables with or without free play feature as gambling devices *per se*.

Omitting for the present the consideration of the pin tables in question, a careful scrutiny of the statute makes it manifest that the purpose of the legislature in enacting such statute was to outlaw those devices which are in and of themselves gambling devices or gambling devices *per se*, and which obviously cannot be used for legitimate purposes without gambling. This conclusion is readily deducible from a consideration of the objects specifically named in the statute, which objects are obviously gambling devices *per se*. The conclusion that the purpose of the legislation was limited solely to the suppression or elimination of gambling devices *per se* and not to gambling in general is also supported by the language in the case of *Ingram v. Bearden, supra*, the most recent case dealing with the machines in question, wherein the Court said, "the type of Pin Table machine in question was declared to be a gambling device *per se* in the *Alexander case, supra*, and because of that fact was subject to confiscation under Section 1301-1 of the 1942 Code". (Emphasis added.) The conclusion that the statute was enacted solely for the purpose of eliminating gambling devices *per se* and not for the purpose of suppressing gambling in general also finds support in the fact that the legislature of South Carolina effectively dealt with the problems of gambling in general by virtue of the provisions of the gambling statute set forth in Sections 1738-1749 of the Code of Laws of South Carolina for 1942.

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For the above reasons we respectfully submit that the manifest purpose of the statute in question was solely to eliminate or suppress those devices which in and of themselves are gambling devices, or gambling devices *per se*, and which obviously cannot be used for legitimate purposes of entertainment or recreation without the presence of the element of gambling.

Point B

The legislative enactment in question as construed by the South Carolina Supreme Court bears no reasonable relation to the purpose for which it was enacted.

We have shown the manifest purpose for which the statute in question was enacted, and, taking the statute to mean what the highest court of the State says it means, *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509, we now proceed to a consideration of the question as to whether or not the statute as construed bears a reasonable relation to the purpose for which it was enacted in order to reach a conclusion as to whether or not it is unconstitutional as being repugnant to the 14th Amendment of the United States Constitution.

We readily admit and concede that it is within the police power of the State to outlaw, suppress and eliminate gambling devices *per se*, and if the pin table machines in question are gambling devices *per se* we have no standing in this Court. We respectfully contend, however, that the pin table machines in question are not gambling devices *per se* and as such the inclusion of them within the prohibition of the legislative enactment bears no reasonable nor substantial relation to the object sought to be attained by the passage of the statute, to wit, the suppression or elimination of gambling devices *per se*.

It is a well established principle of law that when the constitutional protection is sought to be invoked it is the duty of the Courts to determine whether the challenged provision of a statute bears a reasonable relation to the object sought to be attained by the passage of such provision. *Burns Baking Company v. Bryan*, 264 U. S. 504; *Welch v. Swasey*, 214 U. S. 91; *Dobbins v. Los Angeles*, 195 U. S. 222; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Mugler v. Kansas*, 123 U. S. 623; and the reasonableness or unreasonableness of a State enactment is always subject to review by the Federal Courts to determine whether or not such enactment is repugnant to the 14th Amendment of the United States Constitution. *Meyer v. Nebraska*, 262 U. S. 390; *Adams v. Tanner*, 244 U. S. 590.

Although there is diversity of opinion among the courts of the various states as to whether or not pin tables of the type in question are gambling devices *per se*, we respectfully submit that the weight of sound reasoning and good logic fortifies our contention that the machines in question are not gambling devices *per se*, *Chicago Patent Corporation v. Genco, Inc.* (CCA 8th) (1941) 124 Fed. (2d), 725; *Washington Coin Machine Association v. Callahan* (U. S. Circuit Court of Appeals D. C.) (1944) 142 Fed. (2d), 97; *Brafford v. Calhoun*, 72 Ohio. App. 920, 51 N. E. (2d), 920; *Gayle v. Whealan*, 59 Cal. App. (2d), 255, 138 P. (2d), 763; *Commonwealth v. Mihlow*, 142 Pa. Super, 433, 16 A. (2d) 656. The record in the instant case will disclose that the pin table machines in question are constructed and adapted for amusement and recreational purposes only; that the operation of them involves elements of skill and that there is no element of gambling in the playing of these machines as the term "gambling" is commonly understood by the average reasonably prudent person.

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We respectfully submit that the instant case squarely raises the issue as to whether or not the State of South Carolina, through the legislature and the courts arbitrarily treated the pin table machines in question as gambling devices *per se* and thus deprived the appellants of their rights under the 14th Amendment to the United States Constitution; and we urge that the question is most substantial and should be determined by this Court after a full and complete review of the statute, the purpose thereof, and an examination of the facts in order to make an independent determination as to whether or not the machines in question are of such nature so to be classified as gambling devices *per se*, *Truax v. Corrigan*, 257 U. S. 212; *Pollock v. Williams*, 322 U. S. 4, and in order to determine whether or not the inclusion of such machines in the statute bears a reasonable relation to the manifest purpose of the statute, to wit, outlawing of gambling devices *per se*.

The appellees rely on the case of *Murphy v. California*, 225 U. S. 623. In the *Murphy case* the Court, in sustaining the validity of a state statute prohibiting the keeping of billiard tables for hire or public use, stated, "The ordinance is not aimed at the game, but at the place." The instant case is clearly distinguishable for the reason that the statute in question aims directly at the game and not at the place, and if the game is inherently innocent and not a gambling device *per se*, the statute in question, by the inclusion of the pin table machines involved, cannot and does not have any reasonable relation to the object sought to be obtained by its passage. The Court also sustained the statute on the basis of judicial notice of facts which are entirely lacking and totally absent in the case at bar.

The appellees also rely on the case of *Durant v. Bennett*, 54 Fed. Rep. (2d) 634, which is clearly distinguishable from the instant case. The *Durant case* dealt with a slot

machine known as the "one-arm bandit" type and obviously could not be used for any other purpose than gambling. The type of machine in question was not before the Court. A perusal of the record makes it apparent that the pin table machines in question are entirely different and distinguishable from the slot machines involved in the *Durant case.*

Perhaps it might not be amiss to state at this time that the courts in the past have associated coin operated machines of every type with the old "one-arm bandit type" adapted and constructed for easy and fast gambling and for this reason have been prejudiced against them and most reluctant to treat the type of machine in question as being different from the old type of coin operated gambling devices. It is true, as stated by the courts, that the old type of slot machine adapted for easy and fast gambling has been changed in minor particulars in an attempt to bring them within the law and such changes were merely subterfuges and the machines were still adapted for easy and fast gambling and were consequently held to be gambling devices *per se.* The machines in the instant case, however, are not constructed and adapted for fast and easy gambling and have no resemblance in any manner, shape or form to the old coin operated gambling devices, the only similarity between the two types being that they are both operated by the insertion of a coin. On the contrary, with the advent of new developments, material changes and improvements upon the so-called pin table machines, the playing of these machines has become a game of skill, entertainment and amusement, and the philosophy of the courts in the treatment of the old type of coin operated machine is not suited to the present day machine, the condition and circumstances surrounding their operation. We know, from common experience, that unlike the old type of gambling device, the

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modern pin table machines are played by doctors, lawyers, judges, office workers, laborers, and others in all walks of life, for entertainment and purposes of diversion and relaxation from the monotonous routine of their work or profession, and that they are found in places of high repute, including church recreation halls, teen-age canteens, service clubs, and community recreation centers. The courts in recent years, in keeping with the philosophy suited to meet the changing conditions of the machines and the present day circumstances surrounding their operation, are beginning to recognize that the type of pin table machine in question is not in any material way connected with the old form of coin operated gambling devices and consequently have refused to follow the old line of decisions holding that such machines are gambling devices *per se*. The sound reasoning and logic of holding that the pin table machines in question are not gambling devices *per se* are clearly brought out in the opinions of the *Washington Coin case, supra,* and *Chicago Patent case, supra.* We respectfully submit that, after thoroughly analyzing and scrutinizing the operation and mechanics of the type of machine in question, in the light of the philosophy that the law is a progressive science and will adapt itself to new conditions as they arise, *Holden v. Hardy,* 169 U. S. 366; *Dobbins v. Los Angeles, supra,* and in the exercise of sound logic, the conclusion is inescapable that such machines are not gambling devices *per se,* and therefore, this court, in the performance of its judicial function affording the constitutional protection to all forms of lawful amusement, entertainment and recreation which are useful as part of our everyday life, should declare the legislative enactment in question, as construed by the Supreme Court of South Carolina, as arbitrary, unreasonable and having no relation to the object of suppressing gambling devices *per se.*

The other cases relied upon by appellees are decisions of the state courts which deal generally with the right of the states to eliminate those devices which tend to promote gambling, and do not deal with the elimination of gambling devices *per se*, which was the clear intention of the legislature in enacting the statute of South Carolina in question.

Point C

The Statute in question as construed by the South Carolina Supreme Court deprives the Appellants of their rights in violation of the due process of law clause of the 14th Amendment to the United States Constitution.

We respectfully submit that although the state under its police power has the right to suppress and outlaw gambling devices *per se*, yet if the statute in question does not accomplish that object because of the inclusion within the prohibition thereof of devices which are not gambling devices *per se*, such legislative enactment is repugnant to the due process of law clause of the 14th Amendment to the United States Constitution. *Burns Baking Company v. Bryan, supra.*

We have pointed out the manifest purpose of the statute and the fact that the inclusion of the pin table machines in question do not accomplish nor tend to accomplish such manifest purpose of the statute; and for these reasons we respectfully submit that the statute is unconstitutional in accordance with the decisions of this Court.

Conceding, for the purpose of argument, but not admitting, that the statute in question is not limited to the elimination only of gambling devices *per se*, but is broad enough to make its purpose the elimination of gambling in general, we still contend that the inclusion of the pin table machines in question within the prohibition of the statute

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does not even accomplish nor tend to accomplish the elimination of gambling in general. As heretofore pointed out, in accordance with the decisions enunciated by this Court, we respectfully submit that this Court should inquire into and review the reasonableness or unreasonableness of the state enactment in order to determine its constitutionality. Such review will indicate that the operation of the type of pin table machine in question involves the element of skill, arouses the competitive spirit, and is beneficial to individuals as a form of relaxation, entertainment and amusement. Relaxation, entertainment and amusement are playing an ever increasingly important rôle in our American life, and in accordance with such philosophy suited to present day conditions, we respectfully urge that the statute in question deprives the appellees of their fundamental rights under the due process of law clause of the 14th Amendment to the U. S. Constitution. The appellees urge that the statutory provisions should be upheld as an appropriate method of preventing gambling. That such evils exist in some degree in connection with the pin table machines is undoubtedly true "as it unfortunately is true in respect of the same or similar evils" in other kinds of amusements and entertainments such as golf, baseball, bowling, etc. But as this court stated in the case of *Tyson & Bro.-United Theatre Ticket Officers v. Banton*, 273 U. S. 418:

> "evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. • • • It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught.

"What this court said in *Adams v. Tanner*, 244 U. S. 590, 594, 61 L. Ed. 1336, 1342, L. R. A. 1917-F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917-D, 973, in the course of its opinion holding invalid a statute of Washington penalizing the collection of fees for securing employment, is apposite:

" 'Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.' "

The tendency of what is generally or ordinarily or often done in operating the type of machines in question is not towards that which is admittedly immoral or pernicious. The machines in question are unlike billiard or pool tables for hire dealt with by this Court in the *Murphy v. California case, supra,* where two or more players usually participate in a single game for the purpose of gambling. In the operation of the type of machine before the court, the exercise of skill, amusement, recreation and fostering of the competitive spirit are the predominant elements. The element of gambling is the exception and is only incidental to the game just as it may be in the games of baseball, tennis, golf, and others, which are admittedly useful as part of our present everyday American way of life. The evil of gambling in general, which may be incidental to the operation

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of the machines in question, seems to have been effectively dealt with by the state in enacting the provisions of Sections 1738-1749, Code of Laws of South Carolina for 1942.

For the reasons aforementioned we respectfully submit that the instant case presents for the determination of this Court the serious question as to whether or not the statute assailed violates the due process clause of the 14th Amendment to the United States Constitution.

Point D

The South Carolina statute in question as construed by the Supreme Court of South Carolina denies to the Appellants the equal protection of the law.

Assuming that the statute in question as construed by the South Carolina Supreme Court was a valid exercise of police power we contend that it is unconstitutional in that it denies to the appellants the equal protection of the law because it permits the operation of coin operated weighing machines which have a free guess feature and prohibits the operation of the machines in question. The distinctions and classifications sought to be drawn by the statute in question are arbitrary, are not based on natural grounds of reasonableness or public policy, and do not tend to promote the public welfare. The statute in question in effect permits the operation of coin operated weighing machines with free guess feature and prohibits the operation of the machines in question without any reason for the distinction. It also appears that the legislature (Sec. 1738, Code of Laws of S. C., 1942) expressly permits the game of bowling which is very analogous and similar to the pin table game in question in that they both involve the use of skill and an equal amount of balls may or may not be used by the same or different players for each game played, and the player has no way of knowing his score in advance.

We therefore respectfully submit that under the law such statute is unconstitutional as being arbitrary and repugnant to the equal protection of law clause of the 14th Amendment to the United States Constitution. *Lake Shore & M. S. R. Co. v. Smith,* 173 U. S. 684, *Connolly v. Union Sewer Pipe Co., supra, Cotting v. Kansas City Stock Yards Co.,* 183 U. S. 79.

CONCLUSION

The instant appeal presents a serious question as to whether the inclusion of the pin table machines involved within the prohibition of the statute assailed accomplishes or tends to accomplish the manifest purpose of the statute. The substantial question, therefore, arises as to whether such statute contravanes the due process of law clause of the 14th Amendment to the United States Constitution. It also has been pointed out that such statute prohibits the operation of one type of game and permits the operation of similar types without any reason for the distinction, and therefore the substantial question as to whether this statute contravenes the equal protection of law clause to the 14th Amendment of the United States Constitution is presented for the determination of this Court.

For the reasons herein and in accordance with the law applicable to the facts in the instant case we respectfully submit that the constitutional questions raised by this appeal are substantial and the appellees' motion to dismiss or affirm should be overruled and denied.

Respectfully submitted,

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